In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 737

CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This suit was brought under the Indian Claims Commission Act, 60 Stat. 1049, as amended, 25 U.S.C. 70 *et seq.*, to claim additional compensation for lands ceded to the Indians[1] by the Treaty of August 24, 1816, and re-ceded by the Indians to the United States under the Treaty of July 29, 1829, 7 Stat. 320. To determine what the Indians had re-ceded by the 1829 Treaty it was necessary to determine what they owned. For this purpose, the Indian Claims Commission

[1] This suit is brought by the present successors of the "United Nations of Chippewa, Ottawa and Potawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitoouck Rivers" (7 Stat. 320). They are referred to in this brief as the "Indians."

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looked to what the United States had ceded to the Indians in 1816.

By the terms of the 1816 Treaty, the United States relinquished to the Indians the lands in a described tract in Illinois and Wisconsin, "except three leagues square at the mouth of the Ouisconsing [Wisconsin] river, including both banks, *and such other tracts, on or near to the Ouisconsing and Mississippi rivers, as the president of the United States may think proper to reserve: Provided, That such other tracts shall not in the whole exceed the quantity that would be contained in five leagues square.*" (Emphasis supplied.) 7 Stat. 147.[2] The reason for reserving the indefinite "five leagues square" (144,000 acres) was that the lands involved contained valuable lead mines and deposits which the government wanted to insure would at least in part be subject to development and extraction. Although the lead deposits were little exploited before 1825 (Pet. 5a), by 1829 the government had designated about 40,000 acres by issuing leases and mining permits and setting aside 640 acres for the townsite of Galena (Pet. 6a–7a). This left about 100,000 acres available for future selection. The Indian Claims Commission found that, as of 1829, the probable total of unselected lands that actually contained lead deposits did not exceed 18,000 acres. Therefore, the Commission concluded that the possibility that hypothetical purchasers from the Indians as of 1829 would have considered the lead deposits in valuing these lands was remote (Pet. 7a), and the Indian

[2] A map of the areas involved is found on page 22a of the appendix to the petition.

Claims Commission, accordingly, refused to include the lead deposits in assessing the fair value of the re-ceded lands.

The Indians then appealed to the Court of Claims, contending that the Indian Claims Commission had misinterpreted the nature of the reservation of the 144,000 acres in the 1816 Treaty by assuming that the government could select parcels of any size, at any discrete locations, and without time limit. The United States had been effectively reserving the lead deposits by issuing leases and mining permits for sites of up to 320 acres in size (Fdg. No. 75, Indian Claims Commission, 11 Ind. Cl. Comm. 641, 687). These leases and mining permits were scattered throughout the land ceded to the Indians by the 1816 Treaty, rather than being concentrated in a few, compact areas (Fdg. No. 25, 11 Ind. Cl. Comm. 641, 659–660).

The Court of Claims agreed with the Indians, and accordingly reversed the Commission (Pet. 6a–7a). The court found that, under the 1816 Treaty, the President had the right to select a large, contiguous tract, or tracts, but that designating numerous isolated tracts was an abuse of discretion under the reservation. In making selections, however the court found that he might properly have been influenced by the location of known mineral deposits (Pet. 14a–15a). Although the court did agree with the Indians that the value of known but unselected lead deposits should be considered in estimating the value of the lands they re-ceded, the court ruled that the fair market value of the tracts actually selected by the government, even though they should not have been

chosen in the way they were, is to be subtracted from the compensable fair market value of the area as a whole (Pet. 20a–21a). In this light, the Court of Claims remanded the case to the Indian Claims Commission with directions to determine the number of acres actually selected by the United States as of July 29, 1829, through townsite reservation and the granting of mining leases and permits, and to re-determine compensation accordingly (*ibid.*).

ARGUMENT

This case does not warrant plenary consideration by this Court. The case is unique, involving only the construction of two treaties and the fairness of their execution. Petitioners cite no decision of this Court, or any other court, contrary to the decision below, nor do they point to any applicable principle of law involved broader than the peculiar facts of the case. Since the decision is not final, the amount at stake will not be known until the case has been redetermined by the Indian Claims Commission (although the court has specified that the award of over $2,000,000 initially made by the Commission constitutes the absolute minimum amount it may on remand conclude the Indians are entitled to) (see Pet. 4a, 20a).

The sole question posed by the petition is whether, after holding that the United States improperly selected many scattered tracts of mineral land rather than one or a few large contiguous tracts, it was error for the Court of Claims to allow the United States the benefit of the tracts actually selected by way of excluding their value from the fair market

value of the lands re-ceded by the Indians. The government, on the other hand, argued that the 1816 Treaty did authorize the selection of many dispersed parcels, as reflected in the administrative interpretation given contemporaneously by those charged with carrying out the provisions of the treaty. See *Udall* v. *Tallman,* 380 U.S. 1, 16. Since the case presents no issue of general significance, however, the United States has not filed a cross-petition for certiorari. We submit that the same considerations suggest a denial of the present petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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